85-408

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

QUIVIRA MINING COMPANY,
HOMESTAKE MINING COMPANY OF CALIFORNIA,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether federal jurisdiction under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, to regulate discharges into "navigable waters" extends to discharges to a normally dry gully whose only hydrological connection to other waters is by infrequent flooding or, over the course of centuries, by underground flow.

PARTIES TO THE PROCEEDING

Quivira Mining Company is a wholly owned subsidiary of Kerr-McGee Corporation. Homestake Mining Company of California (formerly Homestake Mining Company, a California corporation) is a wholly owned subsidiary of Homestake Mining Company, a Delaware corporation. Case, Pomeroy & Company, Inc. is an affiliate of Homestake Mining Company.

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Quivira Mining Company and Homestake Mining Company of California petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is reported at 765 F.2d 126. The orders of the Administrator and the initial decisions of the Regional Administrator are unreported (App. B, C, D, E, F, *infra*).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and of the implementing regulations promulgated by the U.S. Environmental Protection Agency are reprinted at App. G, *infra*.

STATEMENT OF THE CASE

The petitioners, Quivira Mining Company ("Quivira") and Homestake Mining Company of California ("Homestake"), operate uranium mining and milling facilities in the Grants Mineral Belt in New Mexico. The petitioners pump groundwater from their uranium mines, treat it to remove contaminants, and then discharge it into a normally dry arroyo.[1] The discharged water ordinarily disappears as a result of either evaporation in the arid environment or infiltration into the ground long before any flow reaches a tributary of navigable waters. The court of appeals has held that infrequent flooding and underground flow over the course of centuries establish a connection between the arroyo and a tributary of a navigable-in-fact stream that is sufficient to justify the exercise of federal jurisdiction over the discharges under the Clean Water Act ("CWA").[2] 33

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[1]The arroyo is a gully created in the geological past by the erosive forces of water flowing through the alluvial soils that are found in the area.

[2]In 1977, Congress amended the Federal Water Pollution Control Act of 1972 and stated that the Act might be cited as the Clean Water Act. H. Conf. Rep. No. 830, 95th Cong., 1st Sess. 50, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4424.

U.S.C. §§ 1251, *et seq.* The issue presented is whether federal jurisdiction properly attaches under these circumstances.

The CWA was enacted to protect water quality through the regulation of the discharge of pollutants into "navigable waters," *id.* §§ 1251(a)(1), 1362(12)(A), a term that is defined to mean "waters of the United States," *id.* § 1362(7). The U.S. Environmental Protection Agency ("EPA") is authorized to issue permits to regulate certain discharges under the Act. *Id.* § 1342(a). Discharges that are not regulated by the federal government are subject to regulation by the states.

The treated groundwater that is pumped from the petitioners' mines is discharged in the Arroyo del Puerto. The arroyo is normally dry upstream of the discharges, but on rare occasions may contain flow resulting from precipitation. The flow from the discharges customarily proceeds about three miles south of the furthest downstream discharge point to join another normally dry arroyo, the San Mateo Creek. The flow usually disappears approximately 1.3 miles south of the junction of the Arroyo del Puerto and San Mateo Creek, which is about ten miles from the Rio San Jose.

After its confluence with the Arroyo del Puerto, the channel of San Mateo Creek that existed in the geologic past is substantially disrupted. The channel branches into a braided configuration and then crosses a ranch where the former channel is obstructed by spreader dams. The historic channel of San Mateo Creek is further obstructed downstream by a tailings pile (i.e., a pile of ore residues resulting from milling operations) and by agricultural and housing developments on the outskirts of the town of Grants, New Mexico. Flow in San Mateo Creek joined the Rio San Jose

near Grants in the geologic past. The Rio San Jose is an intermittent stream that flows into the Rio Puerco, which in turn flows intermittently into the Rio Grande. The Rio Grande is a navigable water of the United States.

Despite the absence of any regular or periodic surface flow connecting the discharges to navigable waters, EPA nonetheless asserted jurisdiction over the discharges under the CWA. EPA relied on three theories: (1) at times of severe flooding the discharges might be carried down San Mateo Creek into the Rio San Jose; (2) the discharges enter the groundwater and in the remote future will emerge at a spring that feeds into the Rio San Jose; and (3) the discharges may be consumed by cattle that are sold in interstate commerce.

Quivira and Homestake petitioned EPA for an evidentiary hearing to establish that EPA lacked authority to regulate the discharges. The petitions were granted and Homestake stipulated that its petition could be resolved on the record that would be developed in the Quivira hearing. The hearing was held in July and August 1978 and the Regional Administrator issued his initial decisions on March 10 and 11, 1981. App. B, D, *infra*.[3]

The Regional Administrator concluded that "[o]n relatively rare occasions" floods in San Mateo Creek reached Rio San Jose, thereby establishing the necessary relationship between San Mateo Creek and navigable wa-

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[3]The administrative decisions concerning the Homestake discharge are substantially identical to those issued concerning the Quivira discharge. Accordingly, reference herein will be made only to the Quivira administrative decisions.

ters.[4] App. B, *infra*, at 10a. He stated: "In cases involving intermittent or ephemeral streams like San Mateo Creek, . . . the fact that a tributary relationship occurs 'only once a year, or even less frequently,' is irrelevant. Jurisdiction is still present." *Id.* at 14a, *quoting* an EPA General Counsel's opinion. In his view, EPA jurisdiction could be found whenever there were "geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected." *Id.* at 12a.

The Regional Administrator also upheld EPA's groundwater theory. The testimony at the hearing showed that most of the flow that moved into the alluvium served to recharge the underground aquifers that release water in the mines. The Regional Administrator concluded, however, that at least some of the water might migrate through the alluvium to emerge in Rio San Jose. The time period for such a passage from the point of the usual termination of flow was estimated to require from 154 to 1000 years. The Regional Administrator also found the discharges affected interstate commerce as a result of the consumption of water in San Mateo Creek by cattle.[5]

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[4]The Regional Administrator pointed to testimony that such floods occurred on the average of once every five years. App. B, *infra*, at 10a. This testimony was elicited from only *one* witness, however, and that witness could recall specifically only *one* such flood. Expert testimony established that the single flood actually observed by the witness probably resulted from flow in another watershed that feeds San Mateo Creek. Another long-time local resident could recall no floods that had carried waters from the Arroyo del Puerto to the Rio San Jose.

[5]Cattle are pastured along San Mateo Creek for approximately one month a year below the point of normal disappearance of the flow. The rancher testified that most of his cattle are sold in his own in-state meat market and that anyone purchasing meat at the market could

Both Quivira and Homestake requested that the Administrator review the initial decisions of the Regional Administrator. Despite an acknowledgement that surface flow occurs "on an average of not more than once every five years" and that groundwater flow "may take centuries before reemerging as part of the surface flow," the Administrator issued substantially identical orders denying the petitions for review. App. C, E, *infra*. The Administrator concluded that the Regional Administrator's findings and conclusions were not clearly erroneous.

The petitioners then filed petitions for review of the Administrator's orders with the Court of Appeals for the Tenth Circuit pursuant to 33 U.S.C. § 1369(b)(1). The cases were consolidated.[6] The court found there was substantial evidence to support the findings that surface flow to navigable waters "occasionally occurs, at times of heavy rainfall" and that underground flow to such waters might occur, albeit after "a lengthy period, perhaps centuries." App. A, *infra*, at 4a. (The court pointedly ignored EPA's theory of jurisdiction based on consumption of the discharges by cattle.) Despite the petitioners' assertions that these contacts were insufficient to sustain federal jurisdiction, the court con-

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not legally transport it out of New Mexico. The remainder of the cattle is sold at a slaughter house that operates on a "regional" basis—a term that the Administrative Law Judge informed EPA at the hearing "may be a subdivision of a State."

[6]Quivira also filed a petition for review of a permit for a discharge from its Lee Uranium Mine into San Mateo Creek at a point upstream from its confluence with the Arroyo del Puerto. The Regional Administrator had denied Quivira's request for an evidentiary hearing as to EPA's jurisdiction on the ground that the matter had been resolved in the administrative proceeding concerning Quivira's discharge into the Arroyo del Puerto. App. F, *infra*. The court of appeals consolidated the challenges to EPA's jurisdiction arising from both Quivira discharges and from the Homestake discharge.

cluded that EPA could regulate the discharges under the CWA.

REASONS FOR GRANTING THE PETITION

The decision below is inconsistent with the intent of Congress, conflicts directly with a decision of another circuit that is currently pending for review before this Court, and threatens a serious intrusion on state authority.

1. In recognition of the constitutional limits on federal authority that are created by the Commerce Clause, Congress provided that federal authority under the CWA is limited to the "addition of any pollutant to navigable waters." 33 U.S.C. § 1362(12)(A). The legislative history shows that Congress, although defining "navigable waters" to mean "waters of the United States," *id.* § 1362(7), intended to assure that limits on federal power were respected in the application of the Act. The Congressional intent was ignored by both EPA and the court of appeals.

The legislative history demonstrates that the CWA was enacted in part to provide greater protection of navigable waters than had been achieved under previous legislation. For example, although the Rivers and Harbors Appropriation Act of 1899 required that a permit be obtained before refuse could be deposited in or on a navigable waterway, 33 U.S.C. § 407, the Act had been construed so as not to encompass small feeder streams or wetlands, which though themselves not navigable, flowed into streams that were navigable. *See, e.g., United States* v. *Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974). Congress perceived that this construction was too narrow to be effective, and thus it intended that the scope of the CWA should be broader.[7]

[7]*See* S. Rep. No. 414, 92nd Cong., 1st Sess. 77, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3742; 2 Sen. Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972* 1495 (Comm. Print 1973) (hereinafter "*Legislative History*").

There is no suggestion, however, that Congress intended the CWA to encompass discharges to waters that have a negligible relationship to interstate commerce.

The Conference Committee, which first introduced the section defining "navigable waters" in terms of "waters of the United States," explained that its purpose was to assure a broad interpretation that was "unencumbered by agency determinations." S. Conf. Rep. No. 1236, 92nd Cong., 2nd Sess. 144, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3776, 3822; 1 *Legislative History* at 327. The coverage envisioned by Congress was clearly reflected in the subsequent debate. Mr. Dingell, the floor manager in the House, explained the definition of "navigable waters" by stating that it "is in line with . . . recent judicial opinions."[8] 118 Cong. Rec. 33756-57 (1972), *reprinted in* 1 *Legislative History* at 250. And Senator Muskie, the floor manager in the Senate, explained the intent of the Conference Committee in similar terms.[9] In short, the history shows that Congress under-

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[8]None of the judicial opinions would encompass the discharges at issue here. The opinions establish that navigable waters include waters that are used as a highway in interstate commerce, *see* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). waters that have the capability of such use, *see* The Montello, 87 U.S. (20 Wall.) 430 (1874), waters that in their natural state were navigable-in-fact, despite subsequent physical or economic changes, *see* Economy Light & Power Co. v. United States, 256 U.S. 113 (1921), and waters that could be made navigable-in-fact by reasonable improvements, *see* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

[9]Senator Muskie explained:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transporta-

stood that the CWA would encompass those discharges that regularly or periodically flow, either directly or by way of a tributary, into waterways affecting interstate commerce. Such a connection to interstate commerce by way of surface flow is simply absent here.

The legislative history is also clear that Congress did not intend discharges to groundwater to fall within the scope of the Act. Although the Congress recognized "the essential link between ground and surface waters and the artificial nature of any distinction," the Senate Committee that considered the bill that became the CWA concluded that the regulation of groundwater should remain a state prerogative. S. Rep. No. 414, 92d Cong., 1st Sess. 73, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3739; 2 *Legislative History* at 1491. Moreover, the House explicitly rejected an amendment that was offered on the House floor at the time of final passage that would expand the Act's definition of "discharge of a pollutant" to include "any addition of any pollutant to ground waters from any point source." 118 Cong. Rec. 10666, 10669 (1972); 1 *Legislative History* at 589, 597. Of course, the CWA should not be interpreted along lines that Congress expressly declined to enact. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Constitutional considerations reinforce the need to curb the all-encompassing sweep of federal power that the court

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tion, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

118 Cong. Rec. 33699 (1972), *reprinted in* 1 *Legislative History* at 178. See also S. Rep. No. 414, *supra* note 7, at 77, *reprinted in* 1972 U.S. Cong. & Ad. News 3668, 3742; 2 *Legislative History* at 1495.

of appeals has endorsed. The scope of the commerce power may not be extended to embrace effects upon interstate commerce so indirect and remote that the distinction between what is local and what is national in character would be effectually obliterated. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Accordingly, this Court has repeatedly emphasized that a regulated activity must have a substantial effect on interstate commerce to be subject to federal authority. *SeeHeart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964) (Congress has power to regulate local activities that "have a substantial and harmful effect upon [interstate] commerce"); *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) (activity may be regulated "if it exerts a substantial economic effect on interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (requiring a "close and substantial relation to interstate commerce"). In recognition of these limits, the Court has stated that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution . . . *that may have effects in more than one State.*" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981) (emphasis added). The extension of federal jurisdiction to the discharges at issue here ignores the important constitutional restraints on federal authority.

2. The decision below also directly conflicts with a decision in the court of appeals.[10] The Sixth Circuit recently

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[10]In no reported case has any court of appeals upheld federal jurisdiction where the connection to water affecting interstate commerce is as attenuated as that presented here. *See, e.g.*, United States v. Texas Pipe Line Co., 611 F.2d 345, 346-47 (10th Cir. 1979) (discharge "spilled into an unnamed tributary of Caney Creek, which discharges into Clear Boggy Creek, itself a tributary of the Red River"); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317,

refused to find federal jurisdiction under the CWA because of the absence of contact of a discharge with navigable waters by way of "frequent flooding." *United States* v. *Riverside Bayview Homes, Inc.*, 729 F.2d 391, 398 (6th Cir.), *cert. granted*, 105 S.Ct. 1166 (1984) (No. 84-701).[11] The Sixth Circuit's holding cannot be squared with the decision here.

The Sixth Circuit in *Riverside Bayview Homes* examined a regulation defining the jurisdiction of the United States Army Corps of Engineers[12] over discharges on "wetlands." The court observed:

> The question . . . is how far away from "navigable waters" Congress contemplated that the regulations

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1320 (6th Cir. 1974) (discharge entered Little Cyprus Creek and "Little Cyprus Creek is a tributary to Cyprus Creek, which was a tributary to Pond River, which is a tributary to Green River"). *See also* Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984) (upholding jurisdiction because the discharges could have a "substantial economic effect on interstate commerce"); United States v. Byrd, 609 F.2d 1204, 1209-11 (6th Cir. 1979) (finding potential for substantial effect on interstate commerce because discharge on wetlands "could significantly impair the attraction [a] lake holds for interstate travelers").

EPA's jurisdictional theory based on groundwater flow to navigable waters is novel. Although not reaching the precise question presented here, several courts have rejected EPA's attempts to regulate discharges to groundwater. *See* Exxon Corp. v. Train, 554 F.2d 1310, 1317-18 (5th Cir. 1977); United States v. GAF Corp., 389 F. Supp. 1379, 1383 (S.D. Tex. 1975).

[11]The question presented in the case is:

> Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "wetlands" is limited to areas that support aquatic vegetation only by virtue of "frequent flooding" from adjacent streams, lakes, or seas.

[12]The Corps of Engineers and the EPA share responsibility for enforcement of the Clean Water Act.

> under the Act could drift. It is certainly not clear from the statute that the Corps' jurisdiction goes beyond navigable waters and perhaps the bays, swamps and marshes into which those navigable waters flow. Neither is it clear that Congress intended to subject to the permit requirement inland property which is rarely if ever flooded.

Id. at 397-98. The court concluded that the jurisdictional reach of the Corps should be limited to lands subject to frequent flooding so as to avoid both constitutional infirmity (a taking under the Fifth Amendment) and an overbroad construction of the Act. As the court explained in rejecting a petition for rehearing that requested the court to authorize Corps' jurisdiction:

> [L]ow lying lands would be converted into "navigable waters" by the Court without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable waters. Under such a construction low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is overbroad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction.

Id. at 401. *See also United States* v. *City of Fort Pierre*, 747 F.2d 464, 466-67 (8th Cir. 1984).

In sharp contrast to the Sixth Circuit, which would require contact by "frequent flooding" between a discharge and navigable waters to justify federal jurisdiction under the CWA, the court of appeals below upheld jurisdiction despite the fact that contact by flooding, at best, only "occasionally occurs." App. A, *infra*, at 4a. Resolution of

this conflict between the circuits is essential in achieving a nationally consistent water pollution control, compliance, and enforcement program.

3. The decision of the court of appeals threatens a serious intrusion on state authority. If EPA's jurisdiction is upheld on the gossamer-thin contacts with interstate commerce that are presented here, the constitutional limitation on federal power that is established in the Commerce Clause would for all practical purposes be obliterated.

In the government's view, federal jurisdiction attaches if a surface connection of a discharge to navigable waters could occur, without regard to the frequency of the connection. Indeed, the Regional Administrator stated that the CWA encompasses discharges to any "geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected." App. B, *infra*, at 12a. Thus, in EPA's view, its jurisdiction would encompass a discharge to a dry channel system of prehistoric time that has not flowed water for centuries. Because an extraordinary flood can always be imagined, EPA's jurisdictional theory has no limits. Indeed, this case has particular significance in the arid Southwest because of the prevalence of arroyos that contain flow only infrequently and as a result of unusually heavy precipitation.

The government's groundwater theory also threatens an unlimited expansion of federal power. As noted by the Senate in *rejecting* an amendment that would have brought discharges to groundwater within the scope of the Act, ground and surface water are hydrologically linked to each other. S. Rep. No. 414, 92d Cong., 1st Sess. 73, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3118, 3739; 2 *Legislative History* at 1491. Thus, nearly every discharge to the ground may emerge to surface waters in distant centuries. Indeed,

it is exactly this prospect on which the government relies for jurisdiction here. But if this theory were adequate, any discharge that disappears into the ground could be regulated by the federal government and state authority would entirely disappear.

CONCLUSION

In light of the foregoing, the petition for a writ of certiorari should be granted.

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September 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-2338
No. 83-2339
No. 83-2356

QUIVIRA MINING COMPANY and
HOMESTAKE MINING COMPANY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Filed June 10, 1985

Before HOLLOWAY, Chief Judge; DOYLE, Circuit Judge, and SAFFELS, District Judge.*

SAFFELS, District Judge

Petitioners in these consolidated cases challenge the authority of the Environmental Protection Agency [hereinafter

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*Honorable Dale E. Saffels, United States District Judge, District of Kansas, Sitting by Designation.

EPA] under the Clean Water Act, as amended, 33 U.S.C. 1251, *et seq.*, to regulate the discharge of pollutants from uranium mining and milling facilities into gullies or "arroyos."

Quivira Mining Company [formerly Kerr-McGee Nuclear Corp.] is contesting EPA permits (National Pollution Discharge Elimination System Permits) to two of its uranium milling or mining facilities near Grants, New Mexico. Those facilities are referred to as Ambrosia Lake, which discharges pollutants into Arroyo del Puerto under Permit No. NM0020532, and Lee Mines, which discharges pollutants into San Mateo Creek under Permit No. NM0028207. Homestake Mining Company [formerly United Nuclear Homestake Partners] contests Permit No. NM0020389 regulating its discharges into Arroyo del Puerto. The companies contend that Arroyo del Puerto and San Mateo Creek are not "waters of the United States," and therefore the EPA has no jurisdiction under the Clean Water Act to require permits authorizing discharges into these waters.

This appeal is from two written determinations of the EPA Administrator [hereinafter Administrator] to deny review, which are embodied in orders dated August 5, 1983. There are two issues before the court. First, the court must determine how much deference, if any, to give to the findings of the Administrator. Petitioners contend that the court should evaluate the record independently, giving no special weight to the factual determinations of the agency, because the agency's determinations of the facts are "jurisdictional." The EPA contends that the record is the product of an adjudicatory hearing and the court must find the agency action to be "unsupported by substantial evidence" before such action can be set side [sic]. The second issue is whether the discharges are subject to regulation as discharges into the waters of the United States.

The Clean Water Act does not set forth standards for reviewing the EPA's decision, so this court must look to the Administrative Procedure Act for guidance. 5 U.S.C. 701, *et seq; Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F. 2d 897,

904 (5th Cir. 1983). When agency action is based upon an adjudicatory hearing, the court may not set aside the agency decision unless it is unsupported by substantial evidence. 5 U.S.C. 706(2)(E). Substantial evidence is "such relevant evidence as a reasonable mind would accept to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966). It is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Consolo, supra*, at 620.

Petitioners contend that when the agency's determinations of fact are "jurisdictional," the court must independently assess the record, giving no special weight to the determinations of the agency. See *Crowell v. Benson*, 285 U.S. 22 (1932).

We agree that the court must engage in a substantial inquiry and an in-depth review of the record. *Chrysler Corp. v. Dept. of Transportation*, 472 F. 2d 659 (6th Cir. 1972). Such an inquiry is required by the "substantial evidence" test. *Id.* We disagree, however, that this court may engage in independent or *de novo* review without giving weight to the determination of the Administrator. *Crowell v. Benson, supra*, to the extent that it retains its validity[1], does not apply to this case. The standards set forth in the Administrative Procedure Act govern.

Petitioners' argument would require that in every case involving the issuance of an EPA permit to discharge pollutants the adjudicatory hearings and special findings of the Administrator would be entitled to no special weight. Such a result would contradict the clear meaning of the Administrative Pro-

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[1]See *Estep v. United States*, 327 U.S. 114, 142 (1946) (J. Frankfurter, concurring), that one had supposed that the doctrine of *Crowell v. Benson, supra*, "had earned a deserved repose."

cedure Act and would deprive the appellate courts of the expertise of the agency in determining such matters.[2]

Viewed in the light of the substantial evidence test, the court finds that both the Arroyo del Puerto and the San Mateo Creek flow for short distances from the discharge points. Although neither the Arroyo del Puerto nor the San Mateo Creek is navigable-in-fact, surface flow occasionally occurs, at times of heavy rainfall, providing a surface connection with navigable water independent of the underground flow. Additionally, the waters of the Arroyo del Puerto and the San Mateo Creek soak into the earth's surface, become part of the underground aquifers, and after a lengthly period, perhaps centuries, the underground water moves toward eventual discharge at Horace Springs or the Rio San Jose.

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[2]Petitioners emphasize language in *Avoyelles Sportman's League, Inc. v. Marsh*, 715 F. 2d 897 (5th Cir. 1983), from which petitioners infer that *de novo* review is appropriate when the court must determine whether the EPA has "any" jurisdiction over a particular discharge of pollutants. In *Avoyelles*, the plaintiffs argued that the district court's determination of the wetlands issue under the Clean Water Act was correctly decided under *de novo* review because the EPA's determination was a jurisdictional decision. The court disagreed and noted that the issue in that case was the extent of the EPA's jurisdiction, not the existence of jurisdiction. The landowners there had conceded that thirty-five percent (35%) of the tract was subject to agency jurisdiction. The question was the extent of the agency jurisdiction beyond that 35% of the tract.

The court did not have before it the question of what standard of review would be employed when the agency fact-finding was determinative of the "existence of agency jurisdiction." The supposed implications of the language of *Avoyelles* are not binding on the court. The distinction attempted to be drawn by petitioners between the "extent" of jurisdiction and the "existence" of jurisdiction is a distinction without a difference. In the instant case, the question is one of both the existence and the extent of agency jurisdiction. Petitioners concede that the EPA has jurisdiction over discharges of pollutants into the waters of the United States. Determination of whether certain water is a "water of the United States" is certainly a question going to the extent of the EPA's jurisdiction. In this case, under our limited facts, the question is also determinative of the existence of jurisdiction.

It is the national goal of the Clean Water Act to eliminate the discharge of pollutants into navigable waters. 33 U.S.C. 1251(a)(1). The term "navigable waters" means "the waters of the United States, including the territorial seas." In *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), this court noted that the Clean Water Act is designed to regulate to the fullest extent possible[3] sources emitting pollution into rivers, streams and lakes. *Id.* at 373. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated." *Id.* It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some. *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct.Cl. 1981).

The extent of the Clean Water Act's coverage of discharges of pollution is illustrated by a review of some of the cases which have been before the United States Court of Appeals for the Tenth Circuit. In *Ward v. Coleman*, 598 F.2d 1187 (10th Cir. 1979), *reversed on other grounds* 448 U.S. 242 (1980), the court found that Boggie Creek, a tributary of the Arkansas River, is a navigable water of the United States for purposes of the Clean Water Act because the Arkansas River is navigable in fact. *Id.*, 598 F.2d at 1188, n.1. In *United States v. Earth Sciences, Inc., supra,* the court found the Rito Seco to be a "water of the United States," although it is not navigable in fact nor does it transport any goods or materials, and although it is located entirely in Costilla County, Colorado. Although the Rito Seco did not provide a very significant link in the chain of interstate commerce, the court found that the stipulation of facts indicated at least some interstate impact from the stream and that was all that was necessary under the act. There, the facts were that the stream supported trout and some beaver,

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[3]The Constitution of the United States authorizes the federal government to "regulate Commerce . . . among the several states." U.S. Const., Art. I,§ 8. Congress has plenary authority to regulate commerce falling within the grant. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

the water collected in the reservoirs was used for agricultural irrigation, and the resulting products were sold into interstate commerce. The court stated, "It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce. Every court to discuss the issue has used a commerce power approach and agreed upon that interpretation." *Id.* at 375. In *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979), the court found that the Clean Water Act covered oil spilled into an unnamed tributary of Caney creek, which discharges into Clear Boggie Creek, itself a tributary of the Red River. The record reflected that there was a small flow of water in the unnamed tributary at the time of the spill, but there was no evidence that the other streams were or were not flowing. The court stated, "Congress did not in this Act use the term 'navigable waters' in the traditional sense; Congress intended to extend the coverage of the act as far as permissible under the commerce clause." *Id.* at 347. Even though nothing in the record supported an interstate commerce effect of this unnamed tributary, the court found that it was "without question" within the intended coverage of the Clean Water Act. The result was based substantially on the fact that the tributary was flowing a small amount of water at the time of the spill. "It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense." *Id.*

This court's findings in *Earth Sciences* and *Texas Pipe Line* compel a finding herein affirming the decision of the EPA. Substantial evidence here supports the Administrator's findings that both the Arroyo del Puerto and San Mateo Creek are waters of the United States. Substantial evidence before the Administrator supports his funding that during times of intense rainfall, there can be a surface connection between the Arroyo del Puerto, San Mateo Creek and navigable-in-fact streams. Further, the record supports the finding that both the Arroyo del Puerto and San Mateo Creek flow for a period after the time of discharge of pollutants into the waters. Further, the

flow continues regularly through underground acquifers fed by the surface flow of the San Mateo Creek and Arroyo del Puerto into navigable-in-fact streams. The court finds that the impact on interstate commerce is sufficient enough to satisfy the commerce clause. And, as noted above, it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible under the commerce clause.

The decision of the Administrator is AFFIRMED.

APPENDIX B

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VI

Initial Decision

IN THE MATTER OF:

Kerr-McGee Nuclear Corporation Corporation
Ambrosia Lake Facility
NPDES Permit NM 0020542 [sic]

FINDINGS

A. The Discharge

1. Kerr-McGee Nuclear corporation (Kerr-McGee) operates seven uranium mines and a uranium milling facility in the vicinity of Ambrosia Lake, New Mexico. [Ganus, KM-1.]

2. Kerr-McGee pumps groundwater infiltrating the mine shafts to the surface and diverts it to the milling facility for use in the milling process and disposal. [Ganus, KM-1.]

2. Kerr-McGee disposes of approximately 85% of the water in tailings ponds and discharges the rest into Arroyo del Puerto. [Ganus, KM-1.]

B. The "Water"

1. Arroyo del Puerto is an arroyo or gully incised by the erosive action of water flowing over alluvial soils deposited in the San Mateo Valley in the geologic past. [Nylander, EPA-42.]

2. Approximately three miles downstream from Kerr-McGee's discharge point, Arroyo del Puerto intersects San Mateo Creek, another arroyo. [Ganus, KM-1.]

3. From its junction with Arroyo del Puerto, San Mateo Creek continues in a southwesterly direction until it crosses the line between Valencia and McKinley Counties near "Deadman's Curve," a bend in Highway 53. At "Deadman's Curve," the bed of the creek narrows as it passes through culverts under the highway. Below the highway, San Mateo Creek's channel loses its incised character, branching out into a wider braided configuration. [Nylander, EPA-42; Roundy, Tr. 376, EPA-18; AL-7.]

5. Below "Deadman's Curve," the braided channel of San Mateo Creek crosses the Bert Roundy Ranch, winter range for a cow-calf operation. Spreader dams obstruct the channel in this area. [Nylander, EPA-42; Roundy, Tr. 382; EPA-18; AL-7.]

6. Below the Bert Roundy Ranch, United Nuclear Homestake Partners has erected a tailings pile in the bed of the arroyo, obstructing it. Although aerial photographs taken in 1935 show the channel continuing to Rio San Jose, subsequent agricultural and residential development associated with the town of Grants, New Mexico now obstructs the historical channel below the tailings pile. [Nylander, EPA-42; Robinson, SRI-43; SW-1; SW-4; EPA-18.]

C. Flow

1. In their natural states, Arroyo del Puerto and San Mateo Creek are ephemeral streams, containing surface flow only in response to episodic precipitation. As such flows travel down the arroyos, they are diminished by evapotranspiration and infiltration. Thus, the distance that surface flow continues down the streams is primarily a function of the amount of precipitation. [Ganus, KM-1; Nylander, EPA-42.]

3. Kerr-McGee's discharge, comingled with the discharges of other uranium mining facilities on Arroyo del Puerto and San Mateo Creek, results in surface flow in San Mateo Creek to a point approximately 1.3 miles below its junction with Arroyo del Puerto, even in the absence of precipitation. [Ganus, KM-1.]

4. Occasional natural flows induced by precipitation transport Kerr-McGee's discharge further down San Mateo Creek. Thus, on various occasions, surface flow in the creek has reached "Deadman's Curve" [Carver, Tr. 340; Roundy, Tr. 375], spreader dams on the Bert Roundy Ranch [Roundy, Tr. 382], and the United Nuclear Homestake Partner's tailings pile [Roundy, Tr. 375].

5. On relatively rare occasions, precipitation contributes enough water to the surface flow in San Mateo Creek that it continues past the tailings pile, following roadbeds and flowing across open fields, gradually cutting a new channel in the process, until it reaches Rio San Jose near the Zuni View Trailer Park. Although such events are aperiodic, a local resident estimates their occurrence on the average of once every five years. [Robinson, SRI-43; Carver, Tr.344-347; Nylander, EPA-42.]

6. Some water infiltrating the channel of San Mateo Creek migrates through the underlying alluvium, approximately duplicating the course of the surface channel. At Horace Springs, this underground flow reemerges and enters Rio San Jose. [Ganus, KM-1; KM-2, Tr. 28; Nylander, EPA-42, Tr. 233; AL-4A; AL-4B; AL-4C.]

7. The travel time for this underground flow depends on the distance from its infiltration point to Horace Springs. Kerr-McGee's discharge takes between 154 and 1,000 years to migrate the 23 miles from its usual infiltration point 1.3 miles below the junction of Arroyo del Puerto and San Mateo Creek to Rio San Jose. When precipitation augments surface flow in San Mateo Creek, thus carrying the discharge further downstream, travel time is correspondingly less. [Nylander, EPA-42, Tr. 232-233; Ganus, KM-2, Tr. 27-28.]

8. Rio San Jose flows into Rio Puerco, which flows into the Rio Grande. [Nylander, EPA-42; EPA-21.]

D. Commerce

1. The Bert Roundy Ranch is winter range for Mr. Roundy's cow-calf operation which produces 350-450 calves per year. [Roundy, Tr. 392.]

2. Mr. Roundy consigns some of the calves to the Karler Packing Company in Albuquerque for auction in the interstate cattle market. [Roundy, Tr. 372-373, 377-378; Nylander, EPA-42, Tr. 181-186; EPA-30A EPA-30B; EPA-30C; EPA-32.]

3. Mr. Roundy uses spreader dams to divert surface flow in San Mateo Creek, thereby irrigating grass consumed by his cattle. [Nylander, EPA-42; Roundy, Tr. 382.]

4. Although Mr. Roundy's cattle drink from San Mateo Creek when water flows therein, they normally consume water derived from the alluvium underlying the creek. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; AL-3B; AL4A, AL-4B; AL-6; EPA-37, EPA-38.]

5. The Rio Grande River is a navigable water of the United States. [Nylander, EPA-42.]

CONCLUSIONS

1. Pollution of Arroyo del Puerto is capable of affecting interstate commerce because:

a. Arroyo del Puerto is tributary to the Rio Grande, a navigable water of the United States, and

b. Arroyo del Puerto is tributary to San Mateo Creek, a stream affecting interstate commerce.

2. Under the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251, *et seq*, Arroyo del Puerto is a "navigable water."

DISCUSSION

The sole issue of this adjudication is whether or not Arroyo del Puerto is a "navigable water" as defined in the Federal Water Pollution Control Acts Amendments of 1972 (FWCPA), 33 USC 1251, *et seq*, and thus subject to the regulatory authority of the United States Environmental Protection Agency (EPA). In essence, Kerr-McGee argues Arroyo del Puerto is not a "navigable water" because it does not regularly contrib-

ute surface flow to a "navigable water" of the United States, i.e., a water navigable in fact. This argument is unsupported by the law.

In FWCPA, the term "navigable waters" generally refers to all waters located within the geographic boundaries of the United States. *United States v. Holland*, 373 F.Supp. 665, 672 (M.D. Fla. 1974); *United States v. Ashland Oil and Transportation Co.*, 364 F.Supp. 349, 351 (W.D. Ky. 1973), aff'd 504 F.2d 1317 (6th Cir. 1974); *United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1185 (D. Az. 1975). In determining whether or not a particular area is a "water" and thus included within this definition, the courts have adopted a functional approach, applying the term to geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected.[1] Thus, the term has been applied to areas which are not always inundated, such as wetlands, *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D. D.C. 1975); manmade "mosquito canals" above mean high water level, *United States v. Holland, supra;* diked evaporation ponds, *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); an intermittent stream, *United States v. Texas Pipeline Co.*, 611 F.2d 345 (10th Cir. 1979); and a normally dry arroyo, *United States v. Phelps Dodge Corporation, supra.*

In *United States v. Phelps Dodge Corporation, supra*, the court explained this functional approach at 391 F. Supp. 1187:

> For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend

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[1]EPA's General Counsel also takes this functional approach, opining that "navigable waters" are those, the pollution of which is capable of affecting interstate commerce. 2 Gen. Couns. Op. 139 (February 6, 1973). In former 40 CFR 125.1(p), EPA provided an exemplary list of such waters. Contrary to Kerr-McGee's assertions, that list does not purport to be nor is it exclusive. See *In Re Ely, Nevada*, 2 Gen. Couns. Op. 129 (NPDES Decision 30, September 18, 1975); *In Re Phoenix, Arizona*, 2 Gen. Couns. Op. 283 (NPDES Decision 53, December 17, 1976). Indeed, no administrative agency may lawfully narrow the scope of the statutory definition through regulation. *N.R.D.C. v. Callaway*, 392 F.Supp. 685, 686 (D. DC. 1975).

> to all pollutants which are discharged into *any waterway*, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.

By definition, there is a public interest in navigable waters of the United States, i.e., waters navigable in fact. See e.g. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-405, 61 S.Ct. 291, 298 (1940). Thus, if the water flowing through Arroyo del Puerto reaches such a water, further evidence of interstate commerce is unnecessary to find the arroyo a "navigable water." See e.g. *United States v. Texas Pipe Line Co., supra*, at 611 F.2d 347.

Historically, water from Arroyo del Puerto flowed through San Mateo Creek, Rio San Jose, and Rio Puerco to the Rio Grande, a navigable river of the United States. Admitting that this tributary relationship existed in the past, Kerr-McGee contends that surface flow from San Mateo Creek into Rio San Jose now occurs too irregularly, if at all, to support regulatory jurisdiction.

In fact, such surface flow is a relatively rare event. Arroyo del Puerto and San Mateo Creek lose much of their surface water to evapotranspiration and infiltration, forces enhanced by the many obstructions which have been erected in the historic bed of the creek.[2] Nevertheless, upstream precipitation events occasionally generate enough flow so that a surface connection exists. Larry Carver, a long time resident of Grants, New Mexico who has observed such events,[3] estimates

[2]Although the presence of changed conditions or artificial obstructions to flow is irrelevant to a determination of "navigability" under FWPCA, *P.F.Z. Properties v. Train, supra*, at 393 F.Supp. 1380; *In Re Central Illinois Public Service Co.*, 2 Gen. Couns. Op. 27 (NPDES Decision 7, April 8, 1975); *In Re Phoenix, Arizona, supra*, the record does not indicate how much more frequently the surface connection would exist in the absence of obstruction.

[3]Mr. Ganus, a Kerr-McGee witness, speculates that Mr. Carver actually observed the waters of Lobo Creek, another arroyo which inundates Grants more frequently than San Mateo Creek [Ganus, KM-2.] Mr. Carver's testimony, however, shows that he knows the difference between San Mateo Creek flooding and Lobo Creek flooding. [Carver, Tr. 349-351.]

that they occur on an average of once every five years. (Carver, Tr. 336.] In cases involving intermittent or ephemeral streams like San Mateo Creek, however, the fact that a tributary relationship occurs "only once a year, or even less frequently," is irrelevant. Jurisdiction is still present. *In Re Phoenix, Arizona, supra* at 2 Gen. Coun. Op. 290.

Even were there never surface flow between San Mateo Creek and Rio San Jose, the creek would still be a tributary of navigable waters of the United States. Water infiltrating the bed of San Mateo Creek is not "lost" to the Rio San Jose. All parties to this adjudication agree that at least some of this infiltrating water migrates through the shallow alluvium underlying San Mateo Creek to Horace Springs, where it reemerges and flows into the Rio San Jose. This subsurface connection independently supports a conclusion that Arroyo del Puerto is tributary to the Rio Grande and thus a "navigable water." See *In Re Phoenix, Arizona*, 2 Gen. Couns. Op. 405 (NPDES Decision 70, August 9, 1978).

It was unnecessary for EPA to trace the flow from Arroyo del Puerto as far as Rio San Jose in any event. San Mateo Creek and its underlying alluvium are themselves waters "in which there is some public interest" because their pollution could affect interstate commerce.

Bert Roundy runs a cow-calf operation, maintaining a more or less constant number of cows for breeding and selling the calves they produce. During Spring and Summer, Mr. Roundy's cattle graze near Bluewater, New Mexico. Around the first of September, Mr. Roundy moves his cattle to land adjacent to San Mateo Creek, between the county line and the United Nuclear Homestake Partner's tailings pile. About a month later, he cuts out the calves, 350 to 450 of which are shipped to Albuquerque or Belen, New Mexico for slaughter or auction in the interstate market. The cows and fewer than 20 calves retained for replacement breeding stock remain on the land adjacent to the creek until the following year. [Roundy, Tr. 380, 392, 395; Nylander, EPA-42; EPA-30.]

Water from San Mateo Creek plays an integral role in Mr. Roundy's cow-calf operation. Mr. Roundy and his father before him have built earthen "spreader" dams across the creek, thus checking the occasional flow of water therein and causing it to inundate and saturate a greater surface area. This primitive irrigation promotes the growth of grass, thus increasing the number of cattle that may forage on the land and, correspondingly, the number of cattle available for sale in the interstate market. [Roundy, Tr. 382].

Although Mr. Roundy's cattle occasionally drink from San Mateo Creek, surface flow therein is too infrequent to be a reliable drinking water supply for them. Such a supply is provided by the alluvium underlying the creek, which is tapped by a number of wells on the ranch. It is most probable that Mr. Roundy uses these wells to water his cattle. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; Al-3B; AL-4A; AL-4B; AL-6; EPA-37; EPA-38.]

Pollution of the waters of San Mateo Creek or the underlying alluvium would affect Mr. Roundy's operation and the interstate cattle industry of which it is part. Without a reasonably clean water supply for watering and irrigation, such a business could not survive or contribute cattle to the interstate market.[4]

Mr. Roundy's ranch is, of course, only an example demonstrating the manner in which pollution of San Mateo Creek and the alluvium beneath it could affect interstate commerce. Because of the slowness of underground flow through the alluvium, its pollution by Kerr-McGee's discharge will have little, if any, effect on the present ranching operation. Nevertheless,

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[4]To establish San Mateo Creek's potential effect on interstate commerce, it is unnecessary that cattle have been transported across state lines after quaffing alluvial waters or eating irrigated grass. See e.g. *Wickard v. Filburn*, 317 U.S. 111, 127-128, 63 S.Ct. 82, 90-91 (1942); *Maryland v. Wirtz*, 392 U.S. 183, 192-193, 88 S. Ct. 2017, 2022 (1968). It is here noted, however, that Mr. Roundy's cattle operation formerly used pastures in Colorado as summer range and shipped stock to feedlots in Kansas and Nebraska. [Roundy, Tr. 372, 380, 395.]

such pollution could affect similar commerce in the future. Accordingly, San Mateo Creek and its tributary, Arroyo del Puerto, are "navigable waters" which FWPCA mandates EPA protect.

March 10, 1981

/s/

FRANCES E. PHILLIPS
Acting Regional Administrator

APPENDIX C

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

NPDES Permit No. NM-0020542 [sic]

In the Matter of:

Kerr-McGee Nuclear Corporation (Ambrosia Lake Facility)
Permittee

ORDER DENYING PETITION FOR REVIEW

In a petition for review filed pursuant to 40 CFR § 125.36(n)(1)(1978), Kerr-McGee Nuclear Corporation (Kerr-McGee) requested review of the Regional Administrator's initial decision in which it was concluded that Kerr-McGee's discharges of mineshaft water from its uranium mines in the vicinity of Ambrosia Lake, New Mexico, are subject to the Clean Water Act's requirements governing NPDES permits. Kerr-McGee is not contesting any of the terms or conditions of the above referenced NPDES permit; instead, it argues that the Regional Administrator's decision unlawfully expands the Agency's jurisdiction under the Clean Water Act to include its discharges. The Regional staff did not submit a responsive petition.

As has been decided on numerous occasions in the past (*e.g.*, *Boston Edison Company*, NPDES Appeal No. 78-7, August 28, 1978; *Kerr-McGee Nuclear Corporation (Church Rock Facility)*, NPDES Appeal No. 80-3, May 15, 1980; *IT Corporation (Ascension Parish, Louisiana)*, NPDES Appeal No. 83-2, July 21, 1983), a petition for review is not normally accepted unless the initial decision is clearly erroneous or involves an exercise of discretion or policy which is important and which

should be reviewed as a discretionary matter. The regulations do not confer an automatic right to have the initial decision reviewed on appeal. The burden of demonstrating that the permit should be reviewed is therefore on the person petitioning for review. In the instant proceeding, the following considerations lead me to conclude that the initial decision does not warrant review.

The threshold issue in this proceeding is jurisdictional, *i.e.*, whether the ephemeral stream (arroyo) into which Kerr-McGee's mineshaft water is discharged[1] is part of the "waters of the United States," thus making the discharges subject to the NPDES permit requirements of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*[2] In general, Kerr-McGee's objections to the initial decision center on the fact that the jurisdictional requisites were deemed to have been fully satisfied notwithstanding the fact that there is no continuity of flow between the point of discharge and the point where navigable-in-fact waters are reached; and that, in portions of the channel, the water normally only flows underground (by migration through the alluvium underlying the course of the surface channel), and may take centuries before reemerging as part of the surface flow. These findings do not, however, stand alone. The Regional Administrator also found that surface flow does occasionally occur, albeit on an average of not more than once every five years, thereby providing a surface connection independent of

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[1]The discharges are to an arroyo (Arroyo del Puerto), which intersects another arroyo (San Mateo Creek), which, in turn, after branching out into a braided configuration, crosses a ranch where the channel is obstructed by spreader dams; the flow then continues to a tailings pile erected in the bed of the arroyo and eventually reaches Rio San Jose; the latter, in turn, flows into Rio Puerco, which then flows into the Rio Grande.

[2]Under § 301(a) of the Act, 33 U.S.C. § 1311(a), it is unlawful, *inter alia*, for any person to discharge any pollutant without an NPDES permit issued pursuant to § 402 of the Act, 33 U.S.C. § 1342. The term "discharge of a pollutant" is defined in § 502(12) as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The term "navigable waters" is defined in § 502(7) as "waters of the United States," 33 U.S.C. § 1362(7).

the underground flow. Also, the Regional Administrator found that water in a connecting arroyo, including its underground component, could affect interstate commerce by its effects on pasturage and water supplies for a downstream cattle ranch. Taking these findings and conclusions together, it is clear that the Regional Administrator's initial decision cannot be termed "clearly erroneous" for purposes of deciding whether or not to accept review. Under the applicable court decisions, the definition of "navigable waters" in the statute is to be given the broadest possible interpretation consistent with constitutional principles. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979)("It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way affect interstate commerce."); *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct.Cl. 1981)("It is now well settled that Congress, by adopting this 1972 definition [of "navigable waters"], 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution,' [citations omitted]."). In *United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1187 (D.Ariz. 1975), a case involving criminal charges brought against defendant for discharging pollutants without an NPDES permit, the district court construed the scope of the Agency's jurisdiction to specifically embrace the discharges of pollutants into normally dry arroyos, even if the water in the arroyo eventually ended up in underground waters:

> For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extent to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.
>
> The intention of Congress was to eliminate or to reduce as much as possible all water pollution throughout the United States both surface and underground. To achieve

this purpose Congress provided the Administrator broad powers, including emergency powers set out in Title 33, United States Code, Section 1364.

See also Leslie Salt Co. v. Froehlke, 578 F.2d 742, 745 (9th Cir. 1978)(quoting *Phelps Dodge, supra*); *Avoyelles Sportmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 287 (also quoting *Phelps Dodge*). Accordingly, the petition for review is denied.

So ordered.

/s/

Ronald L. McCallum
Judicial Officer (A-101)

Dated: August 5, 1983

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VI

Initial Decision

IN THE MATTER OF:

United Nuclear-Homestake Partners
Grants, New Mexico
NPDES Permit NM 0020389

FINDINGS

A. The Discharge

1. United Nuclear-Homestake Partners (UNHP) operates four uranium mines and a uranium milling facility in the vicinity of Grants, New Mexico. [Stipulation.[1]]

2. UNHP pumps groundwater infiltrating the mine shafts to the surface and diverts it to the milling facility for removal of leached uranium through ion exchange. [Stipulation.]

3. Although it recirculates much of the water through the mine for additional leaching, UNHP discharges approximately 936,000 gallons per day to Arroyo del Puerto. [Stipulation.]

4. The discharged water contains Radium 226, Uranium, Selenium, and Molybdenum. [Stipulation .]

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[1]The contentions of the parties and facts upon which they are based are substantially similar to those of another adjudication, *In Re Kerr-McGee Nuclear Corporation*, (NPDES Permit NM 0020542 [sic], March 10, 1981). The parties have stipulated that the hearing record in that case, together with supplementary information about UNHP's plant processes and discharge location, shall form the record herein.

B. The "Water"

1. Arroyo del Puerto is an arroyo or gully incised by the erosive action of water flowing over alluvial soils deposited in the San Mateo Valley in the geologic past. [Nylander, EPA-42.]

2. Approximately three and one half miles downstream from UNHP's discharge point, Arroyo del Puerto intersects San Mateo Creek, another arroyo. [Ganus, KM-1; Stipulation.]

3. From its junction with Arroyo del Puerto, San Mateo Creek continues in a southwesterly direction until it crosses the line between Valencia and McKinley Counties near "Deadman's Curve," a bend in Highway 53. At "Deadman's Curve," the bed of the creek narrows as it passes through culverts under the highway. Below the highway, San Mateo Creek's channel loses its incised character, branching out into a wider braided configuration. [Nylander, EPA-42; Roundy, Tr. 376, EPA-18; AL-7.]

5. Below "Deadman's Curve," the braided channel of San Mateo Creek crosses the Bert Roundy Ranch, winter range for a cow-calf operation. Spreader dams obstruct the channel in this area. [Nylander, EPA-42; Roundy, Tr. 382; EPA-18; AL-7.]

6. Below the Bert Roundy Ranch, UNHP has erected a tailings pile in the bed of the arroyo, obstructing it. Although aerial photographs taken in 1935 show the channel continuing to Rio San Jose, subsequent agricultural and residential development associated with the town of Grants, New Mexico now obstructs the historical channel below the tailings pile. [Nylander, EPA-42; Robinson, SRI-43; SW-1; SW-4; EPA-18.]

C. Flow

1. In their natural states, Arroyo del Puerto and San Mateo Creek are ephemeral streams, containing surface flow only in response to episodic precipitation. As such flows travel down the arroyos, they are diminished by evapotranspiration and infiltration. Thus, the distance that surface flow continues down the streams is primarily a function of the amount of precipitation. [Ganus, KM-1; Nylander, EPA-42.]

3. UNHP's discharge, comingled with the discharges of other uranium mining facilities on Arroyo del Puerto and San Mateo Creek, results in surface flow in San Mateo Creek to a point approximately 1.3 miles below its junction with Arroyo del Puerto, even in the absence of precipitation. [Ganus, KM-1.]

4. Occasional natural flows induced by precipitation transport UNHP's discharge further down San Mateo Creek. Thus, on various occasions, surface flow in the creek has reached "Deadman's Curve" [Carver, Tr. 340; Roundy, Tr. 375], spreader dams on the Bert Roundy Ranch [Roundy, Tr. 382], and the UNHP tailings pile [Roundy, Tr. 375].

5. On relatively rare occasions, precipitation contributes enough water to the surface flow in San Mateo Creek that it continues past the tailings pile, following roadbeds and flowing across open fields, gradually cutting a new channel in the process, until it reaches Rio San Jose near the Zuni View Trailer Park. Although such events are aperiodic, a local resident estimates their occurrence on the average of once every five years. [Robinson, SRI-43; Carver, Tr. 344-347; Nylander, EPA-42.]

6. Some water infiltrating the channel of San Mateo Creek migrates through the underlying alluvium, approximately duplicating the course of the surface channel. At Horace Springs, this underground flow reemerges and enters Rio San Jose. [Ganus, KM-1, Km-2, Tr. 28; Nylander, EPA-42, Tr. 233; AL-4A; AL-4B; AL-4C.]

7. The travel time for this underground flow depends on the distance from its infiltration point to Horace Springs. UNHP's discharge takes between 154 and 1,000 years to migrate the 23 miles from its usual infiltration point 1.3 miles below the junction of Arroyo del Puerto and San Mateo Creek to Rio San Jose. When precipitation augments surface flow in San Mateo Creek, thus carrying the discharge further downstream, travel time is correspondingly less. [Nylander, EPA-42, Tr 232-233; Ganus, KM-2, Tr. 27-28.]

8. Rio San Jose flows into Rio Puerco, which flows into the Rio Grande. [Nylander, EPA-42; EPA-21.]

D. Commerce

1. The Bert Roundy Ranch is winter range for Mr. Roundy's cow-calf operation which produces 350-450 calves per year. [Roundy, Tr. 392.]

2. Mr. Roundy consigns some of the calves to the Karler Packing Company in Albuquerque for auction in the interstate cattle market. [Roundy, Tr. 372-373, 377-378; Nylander, EPA-42, Tr. 181-186; EPA-30A; EPA-30B; EPA-30C; EPA-32.]

3. Mr. Roundy uses spreader dams to divert surface flow in San Mateo Creek, thereby irrigating grass consumed by his cattle. [Nylander, EPA-42; Roundy, Tr. 382.]

4. Although Mr. Roundy's cattle drink from San Mateo Creek when water flows therein, they normally consume water derived from the alluvium underlying the creek. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; AL-3B; AL4A; AL-4B; AL-6; EPA-37, EPA-38.]

5. The Rio Grande River is a navigable water of the United States. [Nylander, EPA-42.]

CONCLUSIONS

1. Pollution of Arroyo del Puerto is capable of affecting interstate commerce because:

a. Arroyo del Puerto is tributary to the Rio Grande, a navigable water of the United States, and

b. Arroyo del Puerto is tributary to San Mateo Creek, a stream affecting interstate commerce.

2. Under the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251, *et seq*, Arroyo del Puerto is a "navigable water."

DISCUSSION

The sole issue of this adjudication is whether or not Arroyo del Puerto is a "navigable water" as defined in the Federal Water Pollution Control Act Amendments of 1972 (FWCPA), 33 USC 1251, *et seq*, and thus subject to the regulatory authority of the United States Environmental Protection Agency (EPA). In essence, UNHP argues Arroyo del Puerto is not a "navigable water" because it does not regularly contribute surface flow to a navigable water of the United States, i.e., a water navigable in fact. This argument is unsupported by the law.

In FWCPA, the term "navigable waters" generally refers to all waters located within the geographic boundaries of the United States. *United States v. Holland*, 373 F.Supp. 665, 672 (M.D. Fla. 1974); *United States v. Ashland Oil and Transportation Co.*, 364 F.Supp. 349, 351 (W.D. Ky. 1973), aff'd 504 F.2d 1317 (6th Cir. 1974); *United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1185 (D. Az. 1975). In determining whether or not a particular area is a "water" and thus included within this definition, the courts have adopted a functional approach, applying the term to geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected.[2] Thus, the term has been applied to areas which are not always inundated, such as wetlands, *P.F.Z. Properties, Inc. v. Train*, 393 F.Supp. 1370 (D. D.C. 1975); manmade "mosquito canals" above mean high water level, *United States v. Holland, supra;* diked evaporation ponds, *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir.

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[2]EPA's General Counsel also takes this functional approach, opining that "navigable waters" are those, the pollution of which is capable of affecting interstate commerce. 2. Gen. Couns. Op. 139 (February 6, 1973). In former 40 CFR 125.1(p), EPA provided an exemplary list of such waters. Contrary to UNHP's assertions, that list does not purport to be nor is it exclusive. See *In Re Ely, Nevada*, 2 Gen. Couns. Op. 129 (NPDES Decision 30, September 18, 1975); *In Re Phoenix, Arizona*, 2 Gen. Couns. Op. 283 (NPDES Decision 53, December 17, 1976). Indeed, no administrative agency may lawfully narrow the scope of the statutory definition through regulation. *N.R.D.C. v. Callaway*, 392 F.Supp. 685, 686 (D. D.C. 1975).

1978); an intermittent stream, *United States v. Texas Pipeline Co.*, 611 F.2d 345 (10th Cir. 1979); and a normally dry arroyo, *United States* v. *Phelps Dodge Corporation, supra.*

In *United States v. Phelps Dodge Corporation, supra,* the court explained this functional approach at 391 F.Supp. 1187:

> For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into *any waterway,* including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.

By definition, there is a public interest in navigable waters of the United States, i.e., waters navigable in fact. See e.g. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404-405, 61 S.Ct. 291, 298 (1940). Thus, if the water flowing through Arroyo del Puerto reaches such a water, further evidence of interstate commerce is unnecessary to find the arroyo a "navigable water." See e.g. *United States v. Texas Pipe Line Co., supra,* at 611 F.2d 347.

Historically, water from Arroyo del Puerto flowed through San Mateo Creek, Rio San Jose, and Rio Puerco to the Rio Grande, a navigable river of the United States. Admitting that this tributary relationship existed in the past, UNHP contends that surface flow from San Mateo Creek into Rio San Jose now occurs too irregularly, if at all, to support regulatory jurisdiction.

In fact, such surface flow is a relatively rare event. Arroyo del Puerto and San Mateo Creek lose much of their surface water to evapotranspiration and infiltration, forces enhanced by the many obstructions which have been erected in the historic bed of the creek.[3] Nevertheless, upstream precipita-

[3]Although the presence of changed conditions or artificial obstructions to flow is irrelevant to a determination of "navigability" under FWPCA, *P.F.Z. Properties v. Train, supra,* at 393 F.Supp. 1380; *In Re Central Illinois Public Service Co.*, 2 Gen. Couns. Op. 27 (NPDES Decision 7, April 8, 1975); *In Re Phoenix, Arizona, supra,* the record does not indicate how much more frequently the surface connection would exist in the absence of obstruction.

tion events occasionally generate enough flow so that a surface connection exists. Larry Carver, a long time resident of Grants, New Mexico who has observed such events,[4] estimates that they occur on an average of once every five years. (Carver, Tr. 336.] In cases involving intermittent or ephemeral streams like San Mateo Creek, however, the fact that a tributary relationship occurs "only once a year, or even less frequently," is irrelevant. Jurisdiction is still present. *In Re Phoenix, Arizona, supra* at 2 Gen. Coun. Op. 290.

Even were there never surface flow between San Mateo Creek and Rio San Jose, the creek would still be a tributary of navigable waters of the United States. Water infiltrating the bed of San Mateo Creek is not "lost" to the Rio San Jose. All parties to this adjudication agree that at least some of this infiltrating water migrates through the shallow alluvium underlying San Mateo Creek to Horace Springs, where it reemerges and flows into the Rio San Jose. This subsurface connection independently supports a conclusion that Arroyo del Puerto is tributary to the Rio Grande and thus a "navigable water." See *In Re Phoenix, Arizona*, 2 Gen. Couns. Op. 405 (NPDES Decision 70, August 9, 1978).

It was unnecessary for EPA to trace the flow from Arroyo del Puerto as far as Rio San Jose in any event. San Mateo Creek and its underlying alluvium are themselves waters "in which there is some public interest" because their pollution could affect interstate commerce.

Bert Roundy runs a cow-calf operation, maintaining a more or less constant number of cows for breeding and selling the calves they produce. During Spring and Summer, Mr. Roundy's cattle graze near Bluewater, New Mexico. Around the first of September, Mr. Roundy moves his cattle to land adjacent to

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[4]UNHP speculates that Mr. Carver actually observed the waters of Lobo Creek, another arroyo which inundates Grants more frequently than San Mateo Creek. [Ganus, KM-2.] Mr. Carver's testimony, however, shows that he knows the difference between San Mateo Creek flooding and Lobo Creek flooding. [Carver, Tr. 349-351.]

San Mateo Creek, between the county line and the United Nuclear Homestake Partner's tailings pile. About a month later, he cuts out the calves, 350 to 450 of which are shipped to Albuquerque or Belen, New Mexico for slaughter or auction in the interstate market. The cows and fewer than 20 calves retained for replacement breeding stock remain on the land adjacent to the creek until the following year. [Roundy, Tr. 380, 392, 395; Nylander, EPA-42; EPA-30.]

Water from San Mateo Creek plays an integral role in Mr. Roundy's cow-calf operation. Mr. Roundy and his father before him have built earthen "spreader" dams across the creek, thus checking the occasional flow of water therein and causing it to inundate and saturate a greater surface area. This primitive irrigation promotes the growth of grass, thus increasing the number of cattle that may forage on the land and, correspondingly, the number of cattle available for sale in the interstate market. [Roundy, Tr. 382.]

Although Mr. Roundy's cattle occasionally drink from San Mateo Creek, surface flow therein is too infrequent to be a reliable drinking water supply for them. Such a supply is provided by the alluvium underlying the creek, which is tapped by a number of wells on the ranch. It is most probable that Mr. Roundy uses these wells to water his cattle. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; AL-3B; AL-4A; AL-4B; AL-6; EPA-37; EPA-38.]

Pollution of the waters of San Mateo Creek or the underlying alluvium would affect Mr. Roundy's operation and the interstate cattle industry of which it is part. Without a reasonably clean water supply for watering and irrigation, such a business could not survive or contribute cattle to the interstate market.[5]

[5]To establish San Mateo Creek's potential effect on interstate commerce, it is unnecessary that cattle have been transported across state lines after quaffing alluvial waters or eating irrigated grass. See e.g. *Wickard v. Filburn*, 317 U.S. 111, 127-128, 63 S.Ct. 82, 90-91 (1942); *Maryland v. Wirtz*, 392 U.S. 183, 192-193, 88 S.Ct. 2017, 2022 (1968). It is here noted, however, that Mr. Roundy's cattle operation formerly used pastures in Colorado as summer range and shipped stock to feedlots in Kansas and Nebraska. [Roundy, Tr. 372, 380, 395.]

Mr. Roundy's ranch is, of course, only an example demonstrating the manner in which pollution of San Mateo Creek and the alluvium beneath it could affect interstate commerce. Because of the slowness of underground flow through the alluvium, its pollution by UNHP's discharge will have little, if any, effect on the present ranching operation. Nevertheless, such pollution could affect similar commerce in the future. Accordingly, San Mateo Creek and its tributary, Arroyo del Puerto, are "navigable waters" which FWPCA mandates EPA protect.

March 11, 1981

/s/

FRANCES E. PHILLIPS
Acting Regional Administrator

APPENDIX E

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

NPDES Permit No. NM-0020389

In the Matter of:

United Nuclear — Homestake Partners
Grants, New Mexico

Permittee

ORDER DENYING PETITION FOR REVIEW

In a petition for review filed pursuant to 40 CFR § 124.91(1980), Homestake Mining Company (Homestake), successor in interest to United Nuclear - Homestake Partners, appeals the Regional Administrator's initial decision in which it was concluded that Homestake's discharges of mineshaft water from its uranium mines in the vicinity of Grants, New Mexico, are subject to the Clean Water Act's requirements governing NPDES permits. Homestake is not contesting any of the terms or conditions of the above referenced NPDES permit; instead, it argues that the Regional Administrator's decision unlawfully expands the Agency's jurisdiction under the Clean Water Act to include its discharges. The Regional staff did not submit a responsive petition.

As has been decided on numerous occasions in the past (*e.g.*, *Boston Edison Company*, NPDES Appeal No. 78-7, August 28, 1978; *Kerr-McGee Nuclear Corporation (Church Rock Facility)*, NPDES Appeal No. 80-3, May 15, 1980; *IT Corporation (Ascension Parish, Louisiana)*, NPDES Appeal No. 83-2, July 21, 1983), a petition for review is not normally accepted unless the initial decision is clearly erroneous or involves an

exercise of discretion or policy which is important and which should be reviewed as a discretionary matter. The regulations do not not confer an automatic right to have the initial decision reviewed on appeal. The burden of demonstrating that the permit should be reviewed is therefore on the person petitioning for review. In the instant proceeding, the following considerations lead me to conclude that the initial decision does not warrant review.

The threshold issue in this proceeding is jurisdictional, *i.e.*, whether the ephemeral stream (arroyo) into which Homestakes' mineshaft water is discharged[1] is part of the "waters of the United States," thus making the discharges subject to the NPDES permit requirements of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*[2] In general, Homestake's objections to the initial decision center on the fact that the jurisdictional requisites were deemed to have been fully satisfied notwithstanding the fact that there is no regular or periodic continuity of flow between the point of discharge and the point where navigable-in-fact waters are reached; and that, in portions of the channel, the water normally only flows underground (by migration through the alluvium underlying the course of the surface channel), and may take centuries before reemerging as part of the surface flow. These findings do not, however, stand alone. The Regional Administrator also found that surface flow

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[1]The discharges are to an arroyo (Arroyo del Puerto), which intersects another arroyo (San Mateo Creek), which, in turn, after branching out into a braided configuration, crosses a ranch where the channel is obstructed by spreader dams; the flow then continues to a tailings pile erected in the bed of the arroyo and eventually reaches Rio San Jose; the latter, in turn, flows into Rio Puerco, which then flows into the Rio Grande. Homestake's discharges also contain the pollutants radium 226, uranium, selenium and molybdenum.

[2]Under § 301(a) of the Act, 33 U.S.C. § 1311(a), it is unlawful, *inter alia*, for any person to discharge any pollutant without an NPDES permit issued pursuant to § 402 of the Act, 33 U.S.C. § 1342. The term "discharge of a pollutant" is defined in § 502(12) as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The term "navigable waters" is defined in § 502(7) as "waters of the United States," 33 U.S.C § 1362(7).

does occasionally occur, albeit on an average of not more than once every five years, thereby providing a surface connection independent of the underground flow. Also, the Regional Administrator found that water in a connecting arroyo, including its underground component, could affect interstate commerce by its effects on pasturage and water supplies for a downstream cattle ranch. Taking these findings and conclusions together, it is clear that the Regional Administrator's initial decision cannot be termed "clearly erroneous" for purposes of deciding whether or not to accept review. Under the applicable court decisions, the definition of "navigable waters" in the statute is to be given the broadest possible interpretation consistent with constitutional principles. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way affect interstate commerce."); *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct.Cl. 1981) ("It is now well settled that Congress, by adopting this 1972 definition [of "navigable waters"], 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution,' [citations omitted]."). In *United States v. Phelps Dodge Corporation*, 391 F. Supp. 1181, 1187 (D.Ariz. 1975), a case involving criminal charges brought against defendant for discharging pollutants without an NPDES permit, the district court construed the scope of the Agency's jurisdiction to specifically embrace discharges of pollutants into normally dry arroyos, even if the water in the arroyo eventually ended up in underground waters:

> For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.

> The intention of Congress was to eliminate or to reduce as much as possible all water pollution throughout the United States both surface and underground. To achieve this purpose Congress provided the Administrator broad powers, including emergency powers set out in Title 33, United States Code, Section 1364.

See also Leslie Salt Co. v. Froehlke, 578 F.2d 742, 745 (9th Cir. 1978) (quoting *Phelps Dodge*, supra); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 287 (also quoting *Phelps Dodge*). Accordingly, the petition for review is denied.

So ordered.

/s/

Ronald L. McCallum
Judicial Officer (A-101)

Dated: August 5, 1983

APPENDIX F

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region VI
1201 Elm Street
Dallas, Texas 75270

February 24, 1984

W. J. Shelley
Kerr-McGee Nuclear Corporation
Kerr-McGee Center
Oklahoma City, Oklahoma 73125

Re: Evidentiary Hearing Request
NPDES Permit No. NM0028207

Dear Mr. Shelley

This letter will acknowledge your evidentiary hearing request dated September 13, 1983 which was received September 19, 1983.

I have determined that your request does not set forth material issues of fact relevant to the question of whether a permit should be issued, denied or modified as required by 40 CFR 124.74(b)(1). To wit, issue No. 6.A. has been previously adjudicated and found against the permittee, issue No. 6.B. is a matter of state law and not a subject for an evidentiary hearing. Therefore, your request for an evidentiary hearing is denied.

Issues that can be properly considered at an evidentiary hearing are those that raise material issues of fact. The issues you have raised appear to be issues of law, in that you question the validity of duly promulgated regulations of the Administrator.

This decision may be appealed to the Administrator under 40 CFR 124.91 within 30 days of the date of this letter.

Sincerely,

/s/

Dick Whittington, P.E.
Regional Administrator (6A)

cc: Ms. Judy Grady
Regional Hearing Clerk

Louis W. Rose
Ted Vorhees

APPENDIX G

The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, provides in relevant part:

33 U.S.C. § 1251(a):

> (a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter —
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> . . . .

33 U.S.C. § 1342(a)(1):

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearings, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1362(7):

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(12):

> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the

contiguous zone or the ocean from any point source other than a vessel or other floating craft.

The U.S. Environmental Protection Agency has promulgated a regulation that defines the term "waters of the United States" as follows (40 C.F.R. § 122.2):

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands";

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, and flats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

. . . .

Supreme Court, U.S.
FILED
DEC 9
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-406

In the Supreme Court of the United States

OCTOBER TERM, 1985

QUIVIRA MINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether sparsely watered arroyos, which provide subsurface and intermittent surface flows to a tributary of the Rio Grande, are "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, so that pollutant discharges into the arroyos are subject to regulation under the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-408

QUIVIRA MINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 765 F.2d 126. The orders issued on behalf of the Administrator of the Environmental Protection Agency (Pet. App. 17a-20a, 30a-33a) are unreported, as are the earlier initial decisions (Pet. App. 8a-16a, 21a-29a) of the Regional Administrator of the Environmental Protection Agency's Region VI.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1985. The petition for a writ of certiorari was filed on September 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners Quivira Mining Company and Homestake Mining Company of California mine and mill uranium near Grants, New Mexico.[1] In their operations, they pump groundwater out of their mineshafts, use it either in their milling process or for recirculation back into their mines to leach out additional uranium, and eventually dispose of it on the surface (Pet. 2; Pet. App. 8a, 21a).[2] They discharge some of their mineshaft water into Arroyo del Puerto and San Mateo Creek, the channels of which join one another downstream from petitioners' discharge points and continue farther downstream as San Mateo Creek (*id.* at 8a-9a, 22a).

Like many watercourses in the southwest, Arroyo del Puerto and San Mateo Creek are arroyos—gullies created by past water erosion. Although their channels conduct "surface [water] flow only in response to episodic precipitation" (Pet. App. 9a, 22a), petitioners' discharges, "comingled with the discharges of other uranium mining facilities [into the two arroyos], result[] in surface flow in San Mateo Creek to a point approximately 1.3 miles below its junction with Arroyo del Puerto, even in the absence of precipitation" (*id.* at 9a, 23a). On "relatively rare occasions,

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[1]Kerr McGee Nuclear Corporation and United Nuclear Homestake Partners, the predecessors in interest to Quivira and Homestake, respectively, were the original parties during the proceedings conducted by the Environmental Protection Agency (Pet. App. 17a, 30a). However, they were replaced by petitioners in the court of appeals (*id.* at 2a). For simplicity, a reference in this brief to either petitioner also signifies whichever predecessor in interest acted in its stead at any previous time.

[2]Homestake's uranium mill site has been listed by EPA as one of the top-priority sites in the nation containing hazardous substances, due to contamination of groundwater by uranium. 40 C.F.R. Pt. 300, App. B, Group 9, at 739. This listing was made pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9605.

precipitation contributes enough water to the surface flow in San Mateo Creek" to enable the flow to reach Rio San Jose, which feeds Rio Puerto, a tributary of the navigable Rio Grande (*id.* at 10a, 23a-24a; Pet. 4). In addition, water "infiltrating the bed of San Mateo Creek is not 'lost' to the Rio San Jose" (Pet. App. 14a). Instead, at least some of that water "migrates through the shallow alluvium underlying San Mateo Creek to Horace Springs, where it reemerges and flows into the Rio San Jose" (*ibid.*).[3]

b. From its mine and mill at Ambrosia Lake, Quivira discharges 15% of its mineshaft water in Arroyo del Puerto at a point three miles upstream from the arroyo's junction with San Mateo Creek and stores the remaining water in its tailings ponds (Pet. App. 8a-9a). Upstream from Quivira's discharge point by half a mile, approximately 936,000 gallons of mineshaft water, containing radium 226, uranium, selenium, and molybdenum, are discharged each day by Homestake into Arroyo del Puerto (*id.* at 21a-22a). Additionally, Quivira discharges mineshaft water from its Lee Mine into San Mateo Creek at a point upstream from the creek's confluence with Arroyo del Puerto (Pet. 6 n.6; Pet. App. 2a).

c. Originally, petitioners sought National Pollutant Discharge Elimination System (NPDES) permits from EPA. NPDES permits, authorized by Section 402(a) of the Clean Water Act, 33 U.S.C. 1342(a), enable their holders to discharge pollutants under prescribed restrictions. The permits generally adopt the effluent limitations contained in

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[3]This description of flow in the arroyos is taken from the findings of fact made by EPA's Regional Administrator. In the court of appeals, petitioners challenged these findings, but the court held that they were supported by substantial evidence presented at an adjudicatory hearing conducted by EPA (Pet. App. 6a). Although petitioners continue to criticize the evidence (Pet. 5-6 nn.4-5), the question presented by the petition does not involve the sufficiency of the evidence.

regulations issued by EPA under Sections 301 and 304 of the Act, 33 U.S.C. 1311, 1314. The NPDES permit "transform[s] generally applicable effluent limitations * * * into the obligations (including a timetable for compliance) of the individual discharger." *EPA* v. *California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205 (1976).

EPA issued NPDES permits for discharges from Quivira's Lee Mine and Ambrosia Lake mill and from Homestake's mill (Pet. App. 2a), but petitioners later concluded that they were exempt from the Act's permit requirements. They contended that San Mateo Creek, into which their discharges flowed, is not a "water of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and, therefore, their discharges into the creek were beyond the Act's regulatory coverage and required no NPDES permits whatever.[4]

2. In 1978, petitioners obtained an evidentiary hearing before an administrative law judge to present their argument that EPA lacked authority to regulate their

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[4]The point into which a pollutant is discharged determines the regulatory coverage of the Clean Water Act. Section 402(a) of the Act, 33 U.S.C. 1342(a), requires dischargers to obtain an NPDES permit. In the absence of an NPDES permit, the "discharge of any pollutant" is generally forbidden by Section 301(a) of the Act, 33 U.S.C. 1311(a), except in compliance with other specified provisions of the Act. But the "discharge of a pollutant" is defined in Section 502(12), 33 U.S.C. 1362(12), to mean "any addition of any pollutant to navigable waters * * *." "Navigable waters," in turn, are defined in Section 502(7), 33 U.S.C. 1362(7), as "the waters of the United States, including the territorial seas."

In adopting this definition of "navigable waters," Congress intended the phrase to be read broadly. In the words of the Conference Committee (S. Conf. Rep. 92-1236, 92d Cong., 2d Sess. 144 (1972)):

> The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

discharges.[5] In March 1981, EPA's Regional Administrator issued two separate initial decisions—one for each petitioner—but the text of each was virtually identical (Pet. App. 8a-16a, 21a-29a). The Regional Administrator concluded that Arroyo del Puerto, as tributary both to the Rio Grande, a navigable waterway, and to San Mateo Creek, a stream affecting interstate commerce, "is [itself] capable of affecting interstate commerce" (*id.* at 11a, 24a) and qualifies as a "navigable water" under the Clean Water Act (*ibid.*).

As previously explained (see pages 2-3 & note 3, *supra*), the Regional Administrator made factual findings that, on "relatively rare" occasions, estimated by one area resident to occur on an average of once every five years, precipitation produced sufficient flow to carry the waters of Arroyo del Puerto and San Mateo Creek 23 miles downstream to Rio San Jose (Pet. App. 10a, 23a). Typically, however, surface flow attributable to discharges diminishes at a point on San Mateo Creek 1.3 miles below its junction with Arroyo del Puerto, where it begins to evaporate or enters an underground aquifer to reemerge at Horace Springs and enter the Rio San Jose (*id.* at 9a-10a, 22a-23a).[6] On "various occasions," precipitation would carry the flow to all or part

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[5]Homestake agreed that its claim could be resolved on the record developed at the Quivira hearing (Pet. 4). That hearing addressed Quivira's discharges from the Ambrosia Lake mill into Arroyo del Puerto, but it did not address Quivira's discharges from the Lee Mine into San Mateo Creek.

Quivira's request for an evidentiary hearing to review its Lee Mine permit was denied by EPA's Regional Administrator (Pet. 6 n.6; Pet. App. 34a-35a) on the ground that the issue had been resolved in the EPA proceeding concerning Quivira's discharges into Arroyo del Puerto. In this Court, petitioners do not challenge EPA's refusal to hold a separate hearing for the Lee Mine permit.

[6]The travel time for this underground flow to reemerge at Horace Springs was found to range from 154 to 1,000 years (Pet. App. 10a, 23a).

of the Bert Roundy Ranch, until it was diverted by spreader dams used on the ranch or obstructed by a tailings pile that Homestake had placed in San Mateo Creek below the ranch (*id.* at 10a-11a, 22a-24a). On the Roundy Ranch, some of the cattle, which feed on grasses irrigated by San Mateo Creek water or which drink from the Creek or from wells to its underlying aquifer (*id.* at 11a, 24a), were consigned "for auction in the interstate cattle market" (*ibid.*). From these findings, the Regional Administrator concluded that "San Mateo Creek and its tributary, Arroyo del Puerto, are 'navigable waters,' " which, under the mandate of the Clean Water Act, must be protected by EPA (*id.* at 16a, 29a).

Petitioners asked the Administrator to review the Regional Administrator's decisions; in August 1983, further agency review was denied because the Regional Administrator's findings and conclusions could not "be termed 'clearly erroneous' for purposes of deciding whether or not to accept review" (*id.* at 19a, 32a).

3. Petitioners sought judicial review in the United States Court of Appeals for the Tenth Circuit.[7] The court of appeals affirmed the agency's decisions (Pet. App. 1a-7a). The court of appeals refused petitioners' invitation to "engage in independent or de novo review without giving weight to the determination of the Administrator" (*id.* at 3a). Instead, the court reviewed EPA's decisions under the "substantial evidence" test of the Administrative Procedure Act, 5 U.S.C. 706(2)(E) (Pet. App. 3a).[8] Under this test, the

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[7]Section 509(b)(1) of the Clean Water Act, 33 U.S.C. 1369(b)(1), confers jurisdiction on the courts of appeals to review various EPA determinations, including EPA's actions "in issuing or denying any [NPDES] permit under" Section 402 of the Act, 33 U.S.C. 1342.

[8]In this Court, petitioners do not directly challenge the standard of review employed by the court of appeals.

court of appeals held that substantial evidence supported EPA's findings (*id.* at 6a-7a)

> that during times of intense rainfall, there can be a surface connection between the Arroyo del Puerto, San Mateo Creek and navigable-in-fact streams. Further, the record supports the finding that both the Arroyo del Puerto and San Mateo Creek flow for a period after the time of discharge of pollutants into the waters. Further, the flow continues regularly through underground acquifers [*sic*] fed by the surface flow of the San Mateo Creek and Arroyo del Puerto into navigable-in-fact streams. The court finds that the impact on interstate commerce is sufficient enough to satisfy the commerce clause. And, as noted above, it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible under the commerce clause.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[9] Accordingly, further review is not warranted.

On facts no longer directly challenged by petitioners, the court of appeals sustained a determination by the Environmental Protection Agency that two sparsely watered arroyos in the arid southwest, which conduct subsurface and intermittent surface flows into tributaries of the navigable Rio Grande, and are used by the interstate cattle industry,

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[9]Petitioners' primary contention (Pet. 10-11) is that the decision below conflicts with *United States* v. *Riverside Bayview Homes, Inc.*, 729 F.2d 391 (6th Cir. 1984). That contention, which we believe was without merit in any event, no longer warrants consideration in light of this Court's reversal of the Sixth Circuit's decision (No. 84-701 (Dec. 4, 1985)).

qualify as "waters of the United States." Hence, the arroyos constitute "navigable waters" as broadly defined by Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7), and discharges of pollutants into the arroyos require NPDES permits under Section 402(a), 33 U.S.C. 1342(a). This result comports with a decision rendered more than 10 years ago in *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). There, in a criminal prosecution, the court refused to dismiss an information alleging that discharges of pollutants were made into an arroyo in violation of Sections 301(a) and 309(c)(1) of the Act, 33 U.S.C. 1311(a), 1319(c)(1). The court held that the Clean Water Act controlled pollutant discharges into "*any waterway,* including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters" (391 F. Supp. at 1187 (emphasis in original)). The court explained that (*ibid.*)

> a legal definition of "navigable waters" or "waters of the United States" within the scope of the [Clean Water] Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.[10]

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[10] *Phelps Dodge* also held that, for purposes of a criminal prosecution, the statutory term "waters of the United States" was not void for vagueness on due process grounds (391 F. Supp. at 1187-1188). Accord *United States* v. *Oxford Royal Mushroom Products,* 487 F. Supp. 852, 854-855 (E.D. Pa. 1980). The same conclusion was reached in civil enforcement proceedings under the Clean Water Act. *United States* v. *Tull,* 769 F.2d 182, 186 (4th Cir. 1985).

Phelps Dodge has been cited with approval in *Avoyelles Sportsmen's League, Inc.* v. *Marsh,* 715 F.2d 897, 915 n.32, 917 (5th Cir. 1983); and *United States* v. *Huebner,* 752 F.2d 1235, 1239 n.6 (7th Cir. 1985), cert. denied, No. 84-1613 (Oct. 7, 1985). There have been no contrary decisions holding that discharges into arroyos are beyond the statutory reach of the Clean Water Act or the constitutional reach of the Commerce Clause. Indeed, this Court has expressed its agreement "with the lower courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that *may* have effects in more than one State." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 282 (1981) (emphasis added). See also *United States* v. *Tull,* 769 F.2d 182, 185 (4th Cir. 1985); *United States* v. *Byrd,* 609 F.2d 1204, 1209-1210 (7th Cir. 1979). And, contrary to petitioners' contention (Pet. 10-11 & n.10), no case has held that activities having a "connection to water affecting interstate commerce * * * as attenuated as that presented here" are beyond the constitutional reach of the Clean Water Act.[11]

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[11]Indeed, the cases cited by petitioners (Pet. 10-11 n.10) indicate that the effect on interstate commerce may well be tenuous yet still be sufficient to support jurisdiction under the Clean Water Act. Thus, discharges into remote tributaries of navigable rivers have been held to be within the reach of the Act, even when there was only "a small flow of water" in the remote tributary and no evidence of flows in other streams that fed into the river (*United States* v. *Texas Pipe Line Co.,* 611 F.2d 345, 347 (10th Cir. 1979)), or when proof was totally lacking that the discharged pollutant actually "reached and polluted the navigable river" (*United States* v. *Ashland Oil & Transportation Co.,* 504 F.2d 1317, 1329 (6th Cir. 1974)). Likewise, the courts of appeals have held that waters regulated under the Act include a lake entirely within a single state, unconnected to waters outside the state (*Utah* v. *Marsh,* 740 F.2d 799, 801, 803-804 (10th Cir. 1984)), wetlands adjacent to such a lake (*United States* v. *Byrd,* 609 F.2d at 1208-1211), and a nonnavigable creek in a single county that fed two downstream reservoirs used for

In addition to *Phelps Dodge*, the decision below is strongly supported by *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-1329 (6th Cir. 1974). There, the court held that the coverage of the Clean Water Act was broad enough to encompass the waters of a remote, nonnavigable tributary upstream from a river that was navigable in fact. The Sixth Circuit also ruled that the government need not prove that oil, discharged into the remote tributary, "in fact * * * reached and polluted the navigable river" (504 F.2d at 1329). Noting that such proof is impossible "in many if not all cases" (*ibid.*), and that "[d]rops (or barrels) of oil carry no fingerprints" (*ibid.*), the court construed the Act as dispensing with any such requirement.[12] The Sixth Circuit noted that Congress was

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agricultural irrigation and recreation (*United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374-375 (10th Cir. 1979)). See also *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1186 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Holland*, 373 F. Supp. 665, 673-676 (M.D. Fla. 1974).

Jurisdiction under the Clean Water Act on the facts of the instant cases is thus fully consistent with the cases cited by petitioners. As mentioned previously, the arroyos are used by the interstate cattle industry and feed a navigable river. Such interstate impact "is all that is necessary under the [Clean Water] Act" (*Earth Sciences*, 599 F.2d at 375), and, for that matter, under the Commerce Clause. Even purely intrastate activity, combined with like conduct of others, may affect interstate commerce. Moreover, "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 277. And the impact of isolated acts, when "taken together with that of many others similarly situated, is far from trivial." *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942).

[12]The court in *Ashland* cited the Senate Report on the 1972 amendments to the Clean Water Act, which stated (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)):

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

concerned with the pollution of nonnavigable tributaries as well as navigable streams and concluded that "it is incontestable that substantial pollution of one not only may but very probably will affect the other" (*ibid.*). This analysis clearly comports with the decision below and with the holding of *Phelps Dodge,* 391 F. Supp. at 1187, that "normally dry arroyos" are "waters of the United States" if their flowage "could reasonably end up" in rivers or tributaries.[13]

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[13]Petitioners also challenge (Pet. 11 n.10) the alternative basis for the decision below, which relied on groundwater flow connecting the arroyos with "navigable-in-fact" streams (Pet. App. 6a-7a). Petitioners cite (Pet. 11 n.10) two decisions that they claim rejected "EPA's attempts to regulate discharges to groundwater." The two decisions —*Exxon Corp.* v. *Train,* 554 F.2d 1310 (5th Cir. 1977), and *United States* v. *GAF Corp.,* 389 F. Supp. 1379 (S.D. Tex. 1975) — cannot be characterized so broadly. Both cases involved the injection of industrial wastewater directly from the surface into subsurface deep wells, whereas the discharges involved here were made into surface waters in the arroyos. Both groundwater cases stand for the proposition that direct deepwell injection is not a "discharge" into "waters of the United States" within the meaning of the Clean Water Act. But they are not authority for narrowing the Act's coverage of discharges into *surface waters* that feed subsurface aquifers, which, in turn, feed other surface waters. Indeed, the district court in *GAF Corp.,* 389 F. Supp. at 1383, limited its exclusion of groundwater from regulated waters under the Act to those "underground waters which have not been alleged to flow into or otherwise affect surface waters." EPA's findings in the present cases, however, are to the effect that the underground waters do indeed flow into surface waters (Pet. App. 10a, 23a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 85-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

QUIVIRA MINING COMPANY,
HOMESTAKE MINING COMPANY OF CALIFORNIA,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

ARGUMENT

This case presents a question as to the limits of the jurisdiction of the U.S. Environmental Protection Agency ("EPA") under the Clean Water Act ("CWA"). EPA asserts that groundwater that is pumped from petitioners' uranium mines and then

released (after treatment) to a normally dry arroyo is subject to the CWA. EPA claims that "relatively rare" flooding (Pet. App. at 10a, 25a) and groundwater flow over the course of centuries might establish a connection with another waterway -- an ephemeral stream that is occasionally and indirectly linked to a navigable-in-fact river. Respondent seeks to sustain this extraordinary assertion of federal authority by coloring the facts and by stretching the case law. Indeed, the reasoning of this Court's decision in *United States* v. *Riverside Bayview Homes, Inc.*, 54 U.S.L.W. 4027 (No. 84-701, Dec. 4, 1985), confirms the error of the court of appeals below.

1. Respondent concedes, as it must, the facts demonstrating the attenuated linkage between the discharges and interstate commerce. The respondent makes certain other assertions of fact, however, that may mislead this Court:

a. The respondent states that Homestake's uranium mill site has been listed as "one of the top-priority sites in the nation containing hazardous substances, due to contamination of groundwater by uranium" (Resp. Br. at 2 n.2), thereby creating the impression that the discharges at issue have resulted in extensive contamination. In fact, however, the so-called Homestake mill is nearly twelve miles from the operations (and the discharges) at issue here. The alleged impacts of the Homestake mill are simply irrelevant to the validity of the NPDES permits. Moreover, the groundwater from the mines is processed through ion-exchange plants to recover any uranium content and is treated to remove other constituents

before release (Jt. App. 17, 48, 102, 115-16).[1] There have been no allegations of substantial groundwater contamination resulting from the discharges.

b. Respondent asserts that petitioners applied for and were issued discharge permits, and only "later concluded that they were exempt from the Act's permit requirements" (Resp. Br. at 4). The record below demonstrates, however, that although Quivira's predecessor filed an application for a permit in order to comply with a filing deadline, it questioned EPA's jurisdiction at the very outset (Jt. App. at 12). The challenge to EPA's authority was repeated over the years throughout the slow processing of the applications (Jt. App. 63, 80, 95). Any implication of acquiescence to EPA jurisdiction or of waiver is incorrect.

2. Respondent seeks to justify the decision below by arguing that it is "strongly supported" by two previous decisions: *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975), and *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974). (Resp. Br. at 10; *see id.* at 8-10). Neither case can bear the burden that respondent would impose:

a. The *Phelps Dodge* court ruled on a motion to dismiss a criminal suit for an alleged violation of the CWA. The defendant argued that the term "waters of the United States," 33 U.S.C. § 1362(7), was unduly vague. 391 F. Supp. at 1186. Although finding the issue "close," *id.* at 1184, the *Phelps Dodge* court

[1]The citation refers to the Joint Appendix that was filed with the court of appeals. A copy of the Joint Appendix has been lodged with the Clerk.

concluded that the Act encompasses discharges into normally dry arroyos "where any water which might flow therein *could reasonably end up* in any body of water, to which or in which there is some public interest . . ." *id.* at 1187 (emphasis added). Further, the court stressed the need for significant contact with interstate commerce; it defined the term "waters of the United States" to include normally dry arroyos through which water may flow "where such waters *will ultimately end up* in public waters." *Id.* (emphasis added). Because any surface flow in the arroyos at issue here reaches another stream, at best, "relatively rarely," *Phelps Dodge* would not justify federal jurisdiction. Indeed, when the *Phelps Dodge* case proceeded to trial, the court granted a motion for a judgment of acquittal from the bench, rejecting the Government's contention that the discharge of all pollutants is illegal.[2]

b. The Sixth Circuit decision in *Ashland Oil* is also unavailing to the respondents. In considering the scope of coverage of the CWA, the court emphasized that "Congress was concerned with pollution of the *tributaries* of navigable streams." 504 F.2d at 1329 (emphasis added). In light of the fact that the necessary tributary relationship existed between the discharge and a navigable-in-fact river, *id.* at 1320, the court concluded that the CWA properly applied, *id.* at 1329. But, contrary to the respondent's argument, *Ashland Oil* does not justify the application of the CWA where a tributary relationship does not exist. And it hardly can justify the Regional Administrator's

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[2]The relevant portion of the *Phelps Dodge* transcript is set out as Exhibit 2 to the petitioners' brief in the court of appeals. A copy of the brief has been lodged with the Clerk.

conclusion that the Act encompasses discharges to any "geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected," regardless of the likelihood of flow (Pet. App. at 12a, 25a).

3. The reasoning of this Court's recent decision in *United States* v. *Riverside Bayview Homes, Inc.*, 50 U.S.L.W. 4027 (No. 84-701, Dec. 4, 1985), also demonstrates the error of the court below. *Riverside Bayview Homes* addressed the validity under the CWA of a regulation of the Army Corps of Engineers that defined "waters" subject to the CWA to include wetlands adjacent to waters, regardless of the frequency of flooding. The Court upheld the regulation, but only after an examination of the legislative history and underlying policies of the statutory grant of authority. The legislative history demonstrated that Congress had explicitly refused to narrow the definition of the wetlands subject to the Act. *Id.* at 4031-32. And the policies of the CWA were seen to be furthered by including all adjacent wetlands, regardless of the frequency of flooding, because such wetlands provide a significant aquatic habitat and affect water quality by filtering and purifying water and by slowing erosion. *Id.* at 4030-31.

The same analysis demonstrates the error of the court of appeals here. The legislative history shows no suggestion that Congress intended federal jurisdiction to attach in the instant circumstances (Pet. at 7-9). Moreover, the purposes of the CWA cannot be furthered by regulating discharges that have, at best, negligible flow to other waters.

CONCLUSION

In light of the foregoing, the petition should be granted.

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